

Douglas Elliman LLC v East Harlem Dev. LLC

2010 NY Slip Op 30492(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 601692/08

Judge: Barbara R. Kapnick

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

PRESENT:

PART 39

Index Number : 601692/2008

DOUGLAS ELLIMAN LLC,

vs

EAST HARLEM DEVELOPMENT LLC,

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 is decided in accordance with the accompanying memorandum decision.

FILED
MAR 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/8/10


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: IA PART 39

-----X
DOUGLAS ELLIMAN LLC,

Plaintiff,

-against-

EAST HARLEM DEVELOPMENT LLC,

Defendant.

BARBARA R. KAPNICK, J.:

FILED
MAR 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECISION/ORDER
Index No. 601692/08
Ct. Seq. No. 002

This action for breach of contract arises out of an Executive Sales Agreement dated October 7, 2004 between plaintiff Douglas Elliman LLC ("Douglas Elliman" or "DE") and defendant East Harlem Development LLC (through its managing member, Moshe Gold).

Plaintiff now moves for summary judgment in the amount of \$100,000.00.

Under the Agreement, defendant, the owner of the residential condominium project located at 160-162 and 174-178 East 117th Street, New York, New York, granted plaintiff "the exclusive right to sell all of the residential condominium units (the 'Units') at the Property" during the exclusive sales period. Plaintiff, in turn, agreed to "utilize the full resources and reasonable efforts of its organization in an effort to sell the Units through its licensed brokers and salespersons ('DE Agents')."

Section 17 of the Agreement provides that

Owner shall have the right to terminate this Agreement at any time prior to or after the commencement of the marketing of the Units upon the payment to DE of \$100,000 for the services rendered by DE (the "**Termination Payment**") plus a reimbursement of the internal costs and expenses incurred by DE ("**Internal Costs**"), not to exceed \$5,000.00. Such termination payment and reimbursement of Internal costs shall not be due to DE if Owner sells the Property and the new owner assumes Owner's obligations hereunder.

Pursuant to a "Scope of Services" rider to the Agreement, plaintiff also agreed to perform various services, including collaborating "with project consultants as necessary including the architect and/or interior design teams to develop and enhance unit finish specifications, apartment layouts, and unit mix," and collaborating "with the architectural team as necessary to review, critique and refine unit layouts and elevations from schematic to hard line drawings."

Plaintiff claims that two representatives of Douglas Elliman, Amanda Jhones and Harold Henenson (who has submitted an Affidavit in support of plaintiff's motion), took part in dozens of developmental meetings, including meetings with the project architect, advised defendant regarding the hiring of an interior designer for the common areas, lobby, kitchen and baths, and advised and provided referrals to defendant concerning end loan financing.

Nonetheless, plaintiff claims that beginning in or about October 2007, defendant broke off contact with plaintiff and failed and refused to return its calls. By letter dated December 20, 2007, an attorney for defendant notified plaintiff as follows: "Given that the Agreement has not commenced yet and given that our client is not satisfied with the lack of initial services provided by your company, our client desires to terminate the Agreement."

Mr. Henenson responded on behalf of plaintiff by letter dated January 15, 2008, in which he stated, in relevant part, as follows:

Paragraph 8 of this agreement states that "Owner may terminate this Agreement for cause if DE materially defaults on its obligations set forth in this agreement. In such case, Owner will deliver to DE at its principal place of business a written Notice of Default specifically identifying the material defaults. DE will have 30 days to remedy to Owner's reasonable satisfaction the defaults as identified in such notice."

Therefore, please forward a letter detailing our lack of initial services as stated above, so that we can respond. We have a record of written and telephone communications for the past year with Mr. Chaim Lebowitz and Mr. Moshe Gold, as well Ehrenkrantz, Eckstut & Kuhn Architects regarding the above developments. Our records do not support the client's claims.

If East Harlem Development LLC wishes to terminate our Agreement without cause, then per paragraph 17 of the Agreement, Douglas Elliman would be due a payment of \$100,000.00 plus reimbursement of internal costs and expenses incurred. We will, of course, take such actions as to protect our interests.

Plaintiff claims that this letter went unanswered, and thereafter commenced this action seeking to recover damages for breach of contract.

Plaintiff argues that it is entitled to summary judgment in the amount of \$100,000.00 pursuant to Section 17 of the Agreement.¹

In opposition, defendant has submitted an Affidavit from Moshe Gold, who contends that Section 17 "is clearly a liquidated damages clause, which in fact imposes a penalty of \$100,000.00," which defendant argues is unconscionable. Defendant further argues that plaintiff has failed to submit sufficient information and proof to show that it provided \$100,000.00 worth of services.

However, defendant has failed to submit any proof refuting Henenson's Affidavit and various documents showing that plaintiff, in fact, rendered services on behalf of defendant, and/or to deny that defendant terminated the Agreement without cause.


¹ Plaintiff also argues that it is entitled to summary judgment because defendant failed to timely retain substitute counsel after its prior counsel was granted leave to withdraw by Decision/Order of this Court dated May 28, 2009. Moshe Gold appeared for the status conference scheduled for July 15, 2009 without counsel. However, defendant eventually retained substitute counsel, who appeared at a subsequent conference and submitted papers in opposition to the instant motion.

Accordingly, based on the papers submitted and the oral argument held on the record on January 26, 2010, this Court finds that plaintiff is entitled to summary judgment in the amount agreed to in the contract, i.e., \$100,000.00.

Plaintiff's motion is, therefore, granted, and the Clerk is directed to enter judgment in favor of plaintiff Douglas Elliman LLC and against defendant East Harlem Development LLC in the amount of \$100,000.00, together with interest to be calculated by the Clerk from January 15, 2008, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Dated: March 8, 2010


BARBARA R. KAPNICK
J.S.C.

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J.S.C.
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