

First N.Y. Realty Co., Inc. v Subvoyant Corp.

2010 NY Slip Op 30758(U)

April 1, 2010

Supreme Court, New York County

Docket Number: 109391/2008

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 109391/2008
FIRST NEW YORK REALTY
vs.
SUBVOYANT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 109391/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Cross-Motion/ Affidavits - Exhibits A-E
Answering Affidavits - Exhibits A-C

| PAPERS NUMBERED | |
|-----------------|--|
| 1,2 | |
| 3,4 | |
| 5,6 | |

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 1 2010

MARTIN SHULMAN 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 1

-----X
FIRST NEW YORK REALTY CO., INC.,

Plaintiff,

Index No. 109391/2008

-against-

SUBVOYANT CORPORATION,

Defendant.
-----X

Martin Shulman, J.:

In this action plaintiff, First New York Realty Co., Inc. ("First New York"), a licensed real estate broker, claims defendant Subvoyant Corporation ("Subvoyant"), an entity involved in film editing for television, owes it a commission for helping Subvoyant negotiate a price with its landlord in connection with the landlord's lease buyout offer. Subvoyant now moves for an order dismissing the complaint pursuant to CPLR 3211 (a)(7) and 3212. First New York cross-moves for an order granting it summary judgment on its complaint.

Background

Subvoyant's landlord approached its president, Jason Cacioppo ("Cacioppo"), and offered to buy out the remainder of its commercial lease, initially offering \$150,000. Thereafter, Subvoyant, which needed to relocate once its lease was bought out, entered into a September 11, 2007 contract (the "contract") with First New York. The contract set forth the services First New York would perform for Subvoyant for being granted the exclusive right to represent Subvoyant in its New York real estate arrangements. The contract set forth an enumerated list of the services which First

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New York would provide pursuant to the parties' "conversation." Reimer Aff. in Support, Exh. C. Item 1 recited that First New York would perform an analysis of Subvoyant's "current leases, and consultations and recommendations on the alternatives with respect to the possibility of cancellation, renewal, subletting and/or assignment of those leases." *Id.* Item 6 of the contract recited that First New York would perform the

[n]egotiation of all aspects of any proposed lease document to include discussion on rental, subleasing and assignment privileges, tax and operating escalation, rent commencement, use of space, electricity, cleaning, tenant options, alterations, submission of tenant plans, and other miscellaneous provisions which have potential financial impact.

The remaining itemized services concerned alternative available space and Subvoyant's relocation.

The contract required Subvoyant to inform all other brokers and owners of First New York's appointment under the contract, and permitted First New York "to advise any owner from whom [it] may expect a commission as to the context of this agreement." *Id.* The contract, which was to last for six months unless extended, required Subvoyant, upon termination, to recognize First New York as its broker in connection with any building or space which First New York had introduced to Subvoyant. There were no other provisions in the contract relating to First New York's commissions or compensation.

Thereafter, First New York found Subvoyant replacement space and Subvoyant executed a lease to commence on December 1, 2007. The lease provided that

Subvoyant's new landlord would pay First New York a commission as per a separate agreement between it and the new landlord.¹

Meanwhile, First New York, including its Executive Managing Director, David Workman ("Workman"), assisted Subvoyant in negotiating its lease buyout with its old landlord. On November 29, 2007, Subvoyant entered into a lease surrender agreement with that landlord which provided that, if Subvoyant surrendered the premises by December 31, 2007, it would be entitled to receive a surrender payment of \$510,000, if it gave notice to the old landlord by December 15, 2007. Under the surrender agreement, the old landlord and Subvoyant represented that they had worked with no broker other than Workman of First New York. The surrender agreement further provided, at paragraph 4(b), that Subvoyant was "responsible for any brokerage commission or compensation due to Broker, if any, and Tenant agrees to hold Landlord harmless against any claims for such brokerage commission or compensation arising out of any conversations or negotiations had by Tenant with Broker." Workman Aff., Exh. C. Thereafter, Subvoyant opted to surrender the premises by December 31, 2007 to be entitled to \$510,000.

By letter agreement to Cacioppo dated December 20, 2007, First New York sought to confirm that it had earned a 10% commission on the \$510,000 lease surrender payment. It recited that "[t]his Agreement constitutes the entire understanding between the parties with respect to the Surrender/Buyout of your lease ... and the commission to be paid by you in connection thereto, and any other

¹ On this round of motion practice, neither party revealed how much First New York earned under any separate agreement.

[5]

agreements, whether oral or written ... with respect to the same are hereby cancelled.”
Rierner Aff. in Support at Exh. E. The letter agreement contained a blank signature line
for Subvoyant preceded by “CONSENTED TO AND AGREED.” *Id.*

Cacioppo, upon receipt of this letter agreement, did not sign it because it was
“our understanding” that there was never an agreement for Subvoyant to pay First New
York any commission, including one in connection with the lease buyout. Cacioppo Aff.
at ¶ 9. By cover letter dated January 31, 2008 and allegedly sent on February 5, 2008,
Workman provided Cacioppo with an invoice for \$51,000, representing 10% of the
\$510,000 lease buyout payment, “[a]s per our agreement.” Workman Aff. at Exh. B.

When Subvoyant failed to pay, First New York commenced this action seeking to
recover the 10% commission. The first cause of action is based on an alleged breach
of contract; the second cause of action, which simply repeats all of the prior allegations,
asserts that First New York is entitled to the fair and reasonable value of the services it
provided in connection with the lease surrender; and the third cause of action is based
on an alleged conversion, which occurred when Subvoyant failed to pay First New York
the 10% commission it was allegedly owed.

In particular, the complaint alleges that on or about September 11, 2007,
Subvoyant entered into an agreement with First New York to exclusively represent
Subvoyant in its New York City real estate matters including the right to provide
brokerage services related to the lease surrender; that Subvoyant had agreed to pay it
a 10% commission for its work on that surrender; that First New York found Subvoyant
a new space to lease, so that it could timely vacate its old premises and qualify for the
lease surrender payment; that Subvoyant recognized First New York’s role as a

procuring cause of the lease surrender when it mentioned Workman and First New York in the lease surrender agreement; that Subvoyant has refused First New York's demand for payment of the 10% commission; and that accordingly, First New York is entitled to a judgment in the amount of \$51,000 plus interest from February 5, 2008.

The Instant Applications

Subvoyant now seeks an order granting it summary judgment pursuant to CPLR 3212 and also moves for an order dismissing the complaint pursuant to CPLR 3211(a) (7) for failure to state a cause of action. It urges, relying on the aforementioned documents and Cacioppo's affidavit, that, under item 1 of the contract, it was contemplated that First New York would help Subvoyant negotiate the lease buyout payment amount with its landlord; that such contract never provided that Subvoyant would pay First New York any amount for either its buyout negotiating services or its assistance in procuring new premises, but instead effectively provided that First New York would seek payment from Subvoyant's new landlord; and that at no time did "Subvoyant" ever commit to anything which was not contained in its contract with First New York, including reaching an understanding about paying any commissions to First New York. Subvoyant maintains that since its contract with First New York, which First New York drafted, is clear and unambiguous and does not provide for Subvoyant's payment of a 10% commission, First New York cannot now seek to change the contract's terms to include that commission. Subvoyant's counsel, who lacks personal knowledge, adds that Cacioppo and his father were "told repeatedly" by Workman that Subvoyant would not have to pay for First New York's services. Subvoyant also urges

[*7]
that, since there was an enforceable written contract covering the subject matter of this action, First New York cannot recover in quasi-contract or in quantum meruit.

First New York argues that even if the contract did not expressly address the payment of a commission for First New York's lease buyout negotiating services, that contract did not bar First New York's entitlement to receipt of the 10% commission. First New York further maintains that paragraph 4(b) of the surrender agreement constitutes an "unequivocal acknowledgment" that First New York is entitled to a commission for helping negotiate the lease buyout, irrespective of any amount due it for its work in helping Subvoyant obtain new space. Workman adds, without elaboration, that there was an "explicit agreement and understanding" with "defendant" that it would pay a 10% commission in connection with the lease surrender negotiations. Workman Aff. at ¶¶ 9-10.

He further asserts that there is no dispute that the brokerage services First New York provided, which led to Subvoyant's receipt of \$510,000, were performed at Subvoyant's request. First New York's counsel evidently claims, based on Workman's assertion that there was an agreement to pay a 10% commission, that First New York is entitled to relief under the breach of contract cause of action, but that even if there was no specific agreement as to the amount of the commission, First New York is entitled to the fair and reasonable value of its services in negotiating the lease buyout, which value, Workman claims, is the 10% figure, allegedly the standard figure for negotiating lease buyouts.

Thus, First New York maintains that it is entitled to summary judgment and its commission under either a breach of contract or quantum meruit theory because it was

duly licensed, had an express or implied contract with Subvoyant and because its lease negotiating services were the procuring cause of the lease surrender agreement. See *Sutton & Edwards, Inc. v 68-60 Austin St. Realty Corp.*, 70 AD3d 810 (2d Dept 2010); *Buck v Cimino*, 243 AD2d 681 (2d Dept 1997).

Subvoyant opposes the cross motion, asserting that the case law First New York relies upon for the proposition that it is entitled to a commission is inapposite, since the services rendered did not constitute brokerage services within the meaning of Real Property Law § 440(1). Subvoyant additionally asserts that paragraph 4(b) of the surrender agreement cannot be reasonably construed as an agreement to pay First New York a commission, since it merely recited that Subvoyant would be responsible “for *any* brokerage commission or compensation due to the broker, *if any* [emphases added].” Subvoyant disputes that First New York would be entitled to a commission under an implied contract theory, because the plaintiff failed to establish, as a matter of law, that the buyout negotiating services were rendered and accepted with both sides’ understanding that the services were not being provided gratuitously. Cacioppo adds that “Subvoyant” never agreed to compensate First New York for any services rendered in connection with the lease buyout. Cacioppo Opp. Aff. at ¶ 2. Finally, Subvoyant maintains that Workman has failed to offer any evidentiary support for his assertion that a 10% fee is standard, or that, even if there were any merit to First New York’s claim for a fee on the lease buyout, it should be entitled to a fee on the full buyout, since there had been an offer of \$150,000 before Cacioppo met with First New York.

Discussion

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief by eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). Where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. *Id.* at 324. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of [its] day in court [internal citations omitted]." *Gibson v American Exp. Isbrandtsen Lines, Inc.*, 125 AD2d 65, 74 (1st Dept 1987).

Subvoyant's assertion that First New York is not entitled to any commission or fee because it did not provide brokerage services within the meaning of Real Property Law ("RPL") §440(1) lacks merit. Negotiating a lease buyout between a landlord and tenant on behalf of a tenant, allegedly at the tenant's request, constitutes an offer or attempt "to negotiate a sale ... [or] exchange ... of an ... interest in real estate"² within the meaning of that statute, thereby requiring, pursuant to RPL §440-a, the broker to be licensed when providing such service, so as to "assure ... competency and the observance of professional conduct on the part of real estate brokers and salesmen," since "[c]onstant are the opportunities by concealment and collusion to extract illicit

² If Subvoyant's landlord sought to buy out the lease because the building was to be "demolished, rehabilitated, remodeled or otherwise structurally altered," then First New York may have been acting as a tenant relocater (see RPL §440[4]), which services would fall within RPL §440(1).

gains [internal citations and quotation marks omitted]." *In re Wilson Sullivan Co., Inc.*, 289 NY 110, 114 (1942).

Notably, the term "quantum meruit" has been found to be ambiguous in that it can refer to an implied-in-fact contract to pay the reasonable value of services rendered, or to a quasi-contract claim to prevent unjust enrichment. *Heller v Kurz*, 228 AD2d 263 (1st Dept 1996). A quasi-contract is an implied contract in law, rather than a true contract, and "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Miller v Schloss*, 218 NY 400, 407 (1916); *Heller*, 228 AD2d at 264. "It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy." *Miller*, 218 NY at 407. It is defined not by a promise, agreement or intention of the person to be charged, but by duty. *Id.*; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388-389 (1987).

An implied-in-fact contract is one which is "evidenced by the acts of the parties and not by their verbal or written words – [a] true [contract] which rest[s] upon an implied promise in fact." *Miller v Schloss*, 218 NY at 406 (bracketed matter added). The party seeking to be paid under such a contract usually must establish "that the services were performed and accepted with the understanding on *both* sides that there was a fee obligation [internal citation and quotation marks omitted]." *Sivin-Tobin Assocs., LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 617 (1st Dept 2009). "The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted." *Miller*, 218 NY at 407. Whether an implied-in-fact contract "was formed

and, if so, the extent of its terms, involves factual issues regarding the intent of the parties and the surrounding circumstances." *Rocky Point Props., Inc. v Sear-Brown Group, Inc.*, 295 AD2d 911, 912 (4th Dept 2002); *Jemzura v Jemzura*, 36 NY2d 496, 503-504 (1975).

To establish such a quantum meruit claim a party must show: 1) that it performed services in good faith, 2) that it expected to be remunerated for those services, 3) that the services were accepted by the one for whom they were provided, and 4) the reasonable value of the services provided. *Schwartz v Pierce*, 57 AD3d 1348, 1352 (3d Dept 2008), *app. den.* 12 NY3d 707 (2009); *Heller v Kurz*, 228 AD2d at 264. It is for the trier of fact to determine, based on all of the evidence, whether the claimant had a reasonable expectation of payment for the services it provided and that the services were not gratuitously rendered. *Matter of Alu*, 302 AD2d 520 (2d Dept 2003).

In some cases, an implied contract to pay for services may be inferred from the mere acceptance of those services (*Sibbald v Bethlehem Iron Co.*, 83 NY 378, 381-380 [1881]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [1st Dept 2003]), since "it cannot be assumed that a broker [or provider of services] works gratuitously." *Gronich & Co., Inc. v 649 Broadway Equities Co.*, 169 AD2d 600, 602 (1st Dept 1991). However, such inference "may not be drawn where because of the relationship between the parties, it is natural that such service should be rendered without expectation of pay [interior quotation marks and citation omitted]." *Matter of Alu*, 302 AD2d at 520; Nash and Nugent, *Quantum Meruit: Alternative Commercial-Case Claim*, NYLJ, Aug. 30,

2007, at 4 ("in certain business relationships, when the parties are on good terms, it is natural for one party to provide collateral services with no expectation of compensation"); see also *Hohenberg Co., Inc. v Iwai New York, Inc.*, 6 AD2d 575 (1st Dept 1958) (whether services were provided in furtherance of a brokerage agreement, and were thus covered solely by the sales commission set forth in that agreement, or whether they were subject to another separate agreement, warranting an additional fee in quantum meruit, was for the trier of fact).

Where an express contract exists covering a matter, a party cannot recover under an implied contract theory. *Miller v Schloss*, 218 NY at 406-407; *Schwartz v Pierce*, 57 AD3d at 1352-1353; *SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 (1st Dept 2001); *Panetta v Tonetti*, 182 AD2d 977 (3d Dept), app. den. 80 NY2d 756 (1992). If there is a genuine dispute as to whether a contract covers a dispute, a party may proceed under both contract and quantum meruit theories. *Schwartz*, 57 AD3d at 1353; *Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228 (1st Dept 1993).

The branches of Subvoyant's motion to dismiss First New York's breach of contract and quantum meruit claims, and First New York's cross motion seeking summary judgment on its complaint, are denied. Subvoyant fails to establish as a matter of law that the contract covered First New York's lease buyout negotiating services and barred First New York's commission claim. Also, there are triable issues as to the existence of an express oral contract or an implied contract to pay First New York for its lease buyout negotiating services.

The court's role in construing a contract is to ascertain the parties' intention, at the time they contracted. *Evans v Famous Music Corp.*, 1 NY3d 452, 458 (2004). If such intent can be discerned from the "plain meaning of the language of the contract, there is no need to look further." *Id.* at 458. The contract "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases." *Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007). A contract should be construed to "give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract." *Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d 64, 69 (1st Dept 1999). If a contract is "susceptible to more than one reasonable interpretation," it is ambiguous. *Evans* at 458; *Discovision Assocs. v Fuji Photo Film Co., Ltd.*, _AD3d_, 2010 WL 815448 (1st Dept).

In the instant case, item 1 of the contract, upon which Subvoyant relies, does not mention the buyout or negotiating the buyout with the landlord; it only refers to "consultations and recommendations on the alternatives with respect to the possibility of cancellation, renewal, subletting and/or assignment of those leases." As reflected in item 6 of the contract, First New York knew how to use the word "negotiate" if that was the term it desired to use in item 1. Indeed, the consultations and recommendations mentioned in item 1 may simply be referring to consultations and recommendations with Subvoyant after First New York had conducted negotiations with prospective landlords, as per item 6 of the contract.

If so, "alternatives with respect to the possibility of cancellation" would relate to alternative spaces and proposed leases with other landlords, as the word "alternative" is used in item 3 of the contract, which refers to "alternative available space." It is unlikely

that the phrase relates to negotiating the surrender (cancellation) of the lease with Subvoyant's then current landlord, because that landlord was not interested in renewing the lease or in permitting Subvoyant to sublet or assign its lease, as item 1 further provided.

Rather, the landlord, according to Cacioppo, had, for a two-year period, been attempting to buy out Subvoyant's leasehold. Therefore, the meaning Subvoyant seeks to ascribe to the word "cancellation" in item 1 would appear to render meaningless the balance of the sentence in which that word appears. Further, the contract did not mention any payment for the buyout negotiating services. Rather, it only referred to a commission from an owner as to the contract's "context," and required Subvoyant, upon the contract's expiration, to recognize First New York as its broker solely with respect to any building or space to which First New York introduced Subvoyant.

Also, Cacioppo does not reveal in either of his affidavits any conversation with Workman or any other First New York agent regarding First New York's agreement to negotiate the buyout, including how any such agreement arose and whether such agreement antedated the contract. Nor does Cacioppo indicate how paragraph 4(b) of the lease surrender agreement came about or to what it was referring, when it recited that "any" commission to which First New York may be entitled "if any" was that "arising out of any conversations or negotiations had by" Subvoyant with First New York. Thus, Subvoyant has not established on this motion that the contract bars the payment of a fee to First New York for its lease buyout negotiating services.

Additionally, there are issues as to whether any lease negotiating services were simply provided gratuitously in furtherance of and to facilitate Subvoyant's signing a

lease with a new landlord. This case is distinguishable from those in which the provider of services would receive no fee at all if an implied contract were not found, and thus, where it would be unreasonable for the recipient of services to believe that the service provider was working without the expectation of any fee. Here, First New York was to receive a commission from the new landlord. Also, case law to the effect that lease language providing that the tenant would be responsible for "any" broker's commission constituted an admission that the tenant was liable for a commission (because the word "any" was construed to mean "all" or "every" [see *Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d at 67-68]), is not determinative, since the lease surrender agreement further qualified the phrase "any commissions or compensation" with the words "if any."

The papers also raise an issue as to whether Subvoyant orally agreed to pay First New York a 10% commission for negotiating the lease buyout, as asserted by Workman and denied by Cacioppo, and was therefore in breach of that alleged express oral contract. In light of the foregoing factual issues, First New York's cross motion for summary judgment, and those branches of Subvoyant's motion which seek dismissal of First New York's breach of contract and quantum meruit claims are denied.

As for the balance of Subvoyant's motion, which seeks, pursuant to CPLR 3211(a)(7) and CPLR 3212, an order dismissing the remaining cause of action, sounding in conversion, the application is granted and that cause of action is dismissed, since this action is merely one to recover commissions, and First New York has failed to allege or establish that it ever had possession, title, or control of the disputed funds. *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 592 (2d Dept 2007); *Interstate*

Adjusters, Inc. v First Fidelity Bank, N.A., 251 AD2d 232, 234 (1st Dept 1998); *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883-884 (1st Dept 1982). Further, it should be noted that Workman's affidavit in opposition to the motion and in support of First New York's cross motion for summary judgment on the complaint (Workman Opp. Aff. at ¶ 11), in which he alleges that First New York is entitled to summary judgment on its quantum meruit and breach of contract theories, appears to constitute a tacit concession that the conversion cause of action lacks merit. Thus, the conversion cause of action is dismissed.

Accordingly, it is

ORDERED that First New York Realty Co., Inc.'s cross motion seeking an order granting it summary judgment on its complaint is denied; and it is further

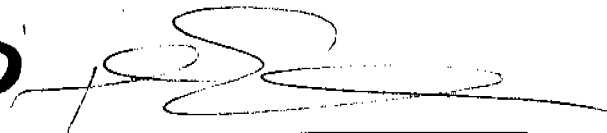
ORDERED that Subvoyant Corporation's motion seeking an order granting it summary judgment is granted solely to the extent that First New York Realty Co., Inc.'s third cause of action, sounding in conversion, is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the first and second causes of action.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
April 1, 2010

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HON. MARTIN SHULMAN, J.S.C.