

Gruppo Levey & Co. v New Catalyst Fund LLC

2010 NY Slip Op 30893(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 108647/09

Judge: Emily Jane Goodman

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4-13-10

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 108647/2009

GRUPPO LEVEY & CO.

vs.

NEW CATALYST LLC

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

is denied
per attached

FILED

APR 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/10

[Signature]

J.S.C.
EMILY JANE GOODMAN

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: IAS PART 17

-----x
GRUPPO LEVEY & CO.,

Plaintiff,

Index No. 108647/09

-against-

NEW CATALYST FUND LLC and
JOHN E. HERMAN,

Defendants.
-----x

Emily Jane Goodman, J.S.C.:

Plaintiff Gruppo Levey & Co. (Gruppo) moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint in connection with a contract executed by Gruppo with defendants New Catalyst Fund LLC (New Catalyst) and John E. Herman (Herman). For the reasons stated below, the motion is denied.

Gruppo seeks to recover \$141,174.26 from defendants pursuant to an agreement which, according to Gruppo, provided that Gruppo would act as an exclusive financial adviser in return for certain payments, including a transaction fee and expenses.

According to Gruppo, it entered into a written agreement with New Catalyst's predecessor, Watermark Media Group, Inc. (Watermark), by way of a contract dated April 23, 2008. The agreement provided that Gruppo would act as financial advisor in connection with the sale of all or part of Watermark's assets.

Gruppo's compensation included a retainer fee in the amount of \$100,000, a transaction fee of \$500,000 plus 6% of the aggregate transaction value in excess of \$10,000,000.00, plus expenses. Moreover, Herman allegedly agreed to personally guarantee all of Watermark's obligations arising in connection with the transaction fee.

The agreement was amended by way of a letter agreement dated October 16, 2008 which increased the retainer and altered the computation of the transaction fee. The new computation of the transaction fee provided for payment of 6% of the aggregate transaction value.

New Catalyst succeeded to the interests of Watermark pursuant to an agreement dated October 16, 2008. Also, on that date, Watermark's obligations to Gruppo were terminated by way of a letter agreement.

Gruppo states that a transaction was eventually completed with an aggregate transaction value of \$2,700,000.¹ The transaction fee was computed as 6% of \$2,700,000.00, or \$162,000.00.

A partial payment was made on January 8, 2009, in the amount of \$25,000.00, leaving a balance of \$137,000. Additionally, expenses in the amount of \$4,174.26 were allegedly incurred.

¹ The term Aggregate Transaction Value includes the transaction amount, the assumption of credit card debt and miscellaneous other payables.

Gruppo states that defendants purported to terminate the agreement by way of a letter dated February 24, 2009, which was forwarded to Gruppo by fax on March 2, 2009. Gruppo acknowledged the purported termination, and reminded the defendants of their obligation to pay the outstanding balance due.

Gruppo now contends that a balance remains in the amount of \$141,174.26, including the unpaid transaction fee of \$137,000 and expenses in the amount of \$4,174.26. It states that defendants' failure to pay the amount due is a breach of the parties' written agreements. Gruppo now seeks summary judgment in lieu of complaint, pursuant to CPLR 3213, in the amount of \$141,174.26.

"CPLR 3213 provides an accelerated procedure for commencement and pursuit of an action where a right to payment can be ascertained from the face of a document, without regard to extrinsic evidence." *Matas v Alpargatas SAIC*, 274 AD2d 327, 328 (1st Dept 2000). "To establish a prima facie case, plaintiff must present an 'instrument[] for the payment of money only' and evidence of a failure to make the payment called for by its terms." *Id*, quoting *Interman Indus. Products, Ltd. v RSM Electron Power*, 37 NY2d 151, 155 (1975). "[T]he only permissible extrinsic evidence would be 'simple proof of nonpayment or a similar de minimis deviation from the face of the document.'" *Diversified Investors Corp. v DiversiFax, Inc*, 239 AD2d 231, 233 (1st Dept 1997), quoting

Weissman v Sinorm Deli, Inc., 88 NY2d 437, 444 [1996].

Here, Gruppo has not demonstrated that it is entitled to relief under CPLR 3213 because its right to recover is not clear from the face of the parties' agreement and determination of that issue requires more than a de minimis deviation from the agreement. Among other things, it is unclear whether a sale of Watermark's assets occurred which was sufficient to trigger Gruppo's right to a transaction fee.

According to defendants, the assets were sold to non-party WTS Investments, LLC (WTS), on January 4, 2009, for \$2,500,000. However, WTS retained the right to return the assets within one year and to cancel a promissory note it executed in that amount. Defendants state that WTS did, in fact, return the assets on January 23, 2009 and canceled the promissory note without making any payments. Therefore, the court finds that questions exist as to whether the transaction with WTS was sufficient to entitle Gruppo to a transaction fee. As such, plaintiff has not demonstrated that it is entitled to recover pursuant to CPLR 3213. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of receipt of a copy of this

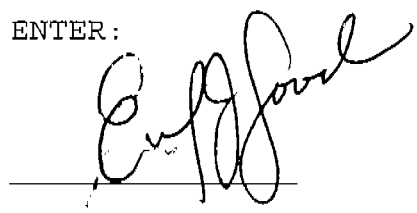
Decision and Order and defendant shall move against or serve an answer to the complaint within 20 days after service of the complaint; and it is further

ORDERED that the parties appear for a preliminary conference on May 27, 2010 at 10am in Room 422 at 60 Centre Street.

This Constitutes the Decision and Order of the Court.

DATED: April 5, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

APR 13 2010

NEW YORK
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