

**First N.Y. Realty Co., Inc. v Wilshire Bancorp,
Inc.**

2010 NY Slip Op 30947(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 602927/09

Judge: Judith J. Gische

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4-21-10

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. _____

PART 10

Justice

Index Number : 602927/2009

FIRST NEW YORK REALTY CO., INC.

vs.

WILSHIRE BANCORP, INC.

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

APR 21 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/16/10

HON. JUDITH J. GISCHE 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 10**

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

Plaintiff

-against-

WILSHIRE BANCORP, INC. d/b/a WILSHIRE
STATE BANK,

Defendant.
-----X

DECISION/ORDER

Index No.: 602927/09

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers

Numbered

Pltf n/m (3212), MM affid, exhs	1
Pltf Rule 19-A Stmt	2
Def x-mot (3212), JDB affirm, SHP affid, exhs	3
Def Rule 19-a Stmt	4
Pltf MM reply affid	5
Pltf Reply to Def's Rule 19-A Stmt	6
JDB reply affirm, exh	7
Def's Reply to Pltf's Rule 19-A Stmt	8
Pltf 2/12/10 Letter	
3/24/10 Email	

FILED
APR 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the court's decision is as follows:

Plaintiff, First New York Realty Co., Inc. ("FNY") moves for partial summary judgment on the issue of defendant Wilshire Bancorp, Inc. d/b/a Wilshire State Bank's ("Wilshire") liability for breach of contract (CPLR § 3212), and an inquest on damages. Wilshire cross-moves for summary judgment in its favor dismissing the complaint. For the reasons that follow, FNY's motion is granted and Wilshire's motion is denied.

Since issue has been joined, but note of issue has been yet been filed, summary judgment relief is available (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Many of the material and relevant facts are based upon documentary evidence or are not in dispute. On or about December 18, 2007, Wilshire entered into an exclusive brokerage agreement with FNY (the "Agreement"). Pursuant to the Agreement, FNY agreed to provide the following services in connection with its exclusive representation of Wilshire with respect to its real estate arrangements in New York:

1. Analysis of Wilshire's "current leases, and consultation and recommendations on the alternatives with respect to the possibility of cancellation, renewal, subletting and/or assignment of those leases."
2. Assistance in the analysis of Wilshire's physical requirements.
3. Preparation of comprehensive survey of alternative available space.
4. Inspection of those buildings and spaces which seem of interest to Wilshire.
5. Presentation of detailed facts on specific buildings or space.
6. Negotiation of all aspects of any proposed lease document.
7. Negotiation of tenant workletter.
8. Assistance in the selection of and consultation with a suitable architectural firm.
9. Conference with Wilshire's consultants on any indirect costs incurred as part of a relocation.

The Agreement had a two year duration, and provided that after one year, either party can serve written notice of cancellation by registered mail, in which event the Agreement would terminate thirty days after service of such notice. Particularly relevant

to this dispute is the clause that “[u]pon and after the termination of th[e] [A]greement, [Wilshire] shall recognize [FNY] as the broker for any building or space to which [Wilshire was] introduced by [FNY].”

On October 27, 2008, Soon Rhee of FNY sent an email to Seung Ho Park of Wilshire containing information regarding the premises located at 308 Fifth Avenue, New York, New York (“308 Fifth Ave”) as a potential location for Wilshire’s bank. The email contained pictures of 308 Fifth Ave, along with a flier with a breakdown of the types of spaces available for rent, and the square footage cost to lease these spaces. FNY contends that at this time, Wilshire indicated it was not interested in leasing the premises at 308 Fifth Ave because of ongoing negotiations to lease another space at 319 Fifth Avenue, New York, New York (“319 Fifth Ave”) which FNY introduced Wilshire to. Wilshire claims that it “repeatedly informed FNY that it was not interested in, and did not want to be presented with, any other space” but that FNY ignored Wilshire’s wishes and forwarded by email advertisements of other real estate brokers directed to the general public. Wilshire claims that it ignored these emails and continued working on securing a lease for premises at 319 Fifth Ave.

With respect to 308 Fifth Ave, there is no dispute that FNY did not present Wilshire with any other information or otherwise perform any other services under the Agreement.

Subsequent thereto, the negotiations for 319 Fifth Ave fell through. Wilshire then sent notice to FNY that the Agreement was terminated on January 38, 2009. By letter dated January 9, 2009, FNY reiterated that pursuant to the terms of the

Agreement, FNY "must still be recognized with respect to any building or space introduced to Wilshire during the term of the Agreement." By letter dated February 9, 2009, FNY provided Wilshire with a list of seven locations introduced by it to Wilshire during the term of the Agreement; 308 Fifth Ave was included in this list.

In or about the spring of 2009, Wilshire retained the services of another broker, and entered into a lease for premises at 308 Fifth Ave without recognizing FNY as the broker or paying a commission with respect thereto.

FNY argues that it has established as a matter of law that it "introduced" Wilshire to 308 Fifth Ave, and pursuant to the Agreement, is entitled to a commission in connection with the lease Wilshire entered into. Wilshire contends, however, a mere email along with a flier available to the general public is not enough to "introduce" it to 308 Fifth Ave. Wilshire also raises the argument that it could not have been introduced to 308 Fifth Ave since it clearly communicated to FNY that it did not want to be introduced to any other properties while the negotiations for a least at 319 Fifth Ave were ongoing. Further, Wilshire contends that even if FNY introduced it to 308 Fifth Ave, FNY cannot recover a commission because it was not the procuring cause of the subject lease.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557,

562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (Zuckerman v. City of New York, *supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 [1993]). Each party must meet its own burden with respect to their applications for summary adjudication.

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

In this dispute, the first issue that must be addressed is whether there is ambiguity in the Agreement with respect to the Introduction clause. The fundamental rule of contract interpretation is that agreements are to be construed in accordance with the parties' intent, and the best evidence of what the parties intend is within the four corners of the contract (Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 60 AD3d 61 [1st Dept 2008]).

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (W.W.W. Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 [1990]). A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties (Teichman v. Community Hosp. of W. Suffolk, 87 NY2d 514, [1996]; Morlee Sales Corp. v. Manufacturers Trust Co., 9 NY2d 16 [1961]).

"Whether an agreement is ambiguous is a question of law for the courts ... Ambiguity is determined by looking within the four corners of the document, not to outside sources" (Kass v. Kass, 91 NY2d 554, 566 [1998] [citations omitted]). "Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (Atwater & Co. v. Panama R.R. Co., 246 NY 519, 524 [1927]). There is no ambiguity where the language chosen by the parties has "a definite and precise meaning." (Greenfield v. Philles Records, 98 NY2d 562 [2002] [citation omitted]).

The relevant clause is as follows: "[u]pon and after the termination of th[e] [A]greement, [Wilshire] shall recognize [FNY] as the broker for any building or space to which [Wilshire was] **introduced** by [FNY]" (emphasis added). The court finds that the term "introduced" is not ambiguous, and that the October 28, 2008 email serves as an introduction by FNY to Wilshire of the premises located at 308 Fifth Ave. The commonly understood definition of "introduce" is "to lead or bring in esp. for the first time... to bring into play" (*Webster's New Collegiate Dictionary*, p. 635). Within the

context of the Agreement, the term "introduced" merely meant that FNY was required to bring to Wilshire's attention a suitable premises for Wilshire's purposes. In the context of the Agreement, the term "introduced" cannot reasonably have a different meaning (see i.e. New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc., 28 AD3d 175 [1st Dept. 2006]). The court rejects Wilshire's argument that this email could not have been an introduction since FNY did not perform any of the services set forth in the Agreement, such as bring a Wilshire representative to the 308 Fifth Ave. The agreement did not specify any such preconditions to an introduction by FNY, and the court will not deviate from the term's ordinary meaning.

The court also rejects Wilshire's argument that FNY cannot recover a commission because it was not the procuring cause of the sale or lease. Without an agreement to the contrary, a broker does not entitled to commissions simply because he initially called the property to the attention of the ultimate purchaser (Greene v. Hellman, 51 NY2d 197 [1980]). However, in this case, the parties agreed to the terms contained in the Agreement, and FNY is suing for a breach of that agreement, not on a theory of *quantum meruit* in the absence of such an agreement.

Accordingly, for all these reasons, FNY has established entitlement to summary judgment on the issue of Wilshire's liability for breach of the Agreement and an inquest on FNY's damages shall be held after plaintiff files note of issue. Wilshire's cross-motion for summary judgment is denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on the issue of the defendant's liability is granted; and it is further


ORDERED that the defendant's cross-motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 27, 2010 at Part 10, 60 Centre Street, Rm 132 so that an expedited discovery schedule can be set on the issue of damages.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 16, 2010

So Ordered:


Hon. Judith J. Gische, J.S.C.

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