

**Peter R. Friedman, Ltd. v Tishman Speyer Hudson
LP**

2010 NY Slip Op 33806(U)

March 18, 2010

Sup Ct, New York County

Docket Number: 602784/2009

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 602784/2009
PETER R. FRIEDMAN LTD.,
VS.
TISHMAN SPEYER HUDSON LIMITED
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

Justice

INDEX NO. 602784-09
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for

E-Filed
PAPERS NUMBERED
5-18

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 IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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NYS SUPREME COURT - CIVIL

Dated: _____

JUSTICE SHIRLEY WERNER KORNREICH

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):

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

-----X

PETER R. FRIEDMAN, LTD,

Plaintiff,

Index No. 602784/2009

DECISION & ORDER

-against-

TISHMAN SPEYER HUDSON LIMITED
PARTNERSHIP and TST HUDSON LLC,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.

In this action to recover a brokerage commission based upon a written agreement, defendants move to dismiss the complaint on the ground that the complaint fails to state a cause of action or is disproved by documentary evidence.¹ CPLR §3211(a)(1) and (7). As this is a motion to dismiss, the court must accept the allegations of the complaint as true and give them the benefit of every favorable inference [*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005)], unless they are utterly refuted by the documentary evidence upon which defendants rely. *Goshen v Mutual Life Ins. Co. of N.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The Complaint

The complaint makes the following allegations. Plaintiff is a licensed real estate broker. In June 1984, Compton Communications, Inc., which was acquired in the 1980's by Saatchi &

¹ Defendants' motions for a protective order and to quash subpoenas are moot, as plaintiffs have withdrawn their discovery requests and subpoenas without prejudice to renewing them after determination of the motion to dismiss.

Saatchi (Saatchi), an advertising agency,² retained plaintiff as its exclusive agent and consultant to find a new national headquarters. At that time, defendant Tishman Speyer Hudson Limited Partnership (Tishman) owned the ground lease at 375 Hudson Street, New York, NY (Property), which it planned to develop into an approximately one-million-square-foot office building. Defendant TST 375 Hudson LLC (TST) presently holds the ground lease.³

Tishman asked plaintiff to market the Property to its clients. Upon plaintiff's recommendation, Saatchi moved its headquarters and ultimately leased approximately 80% of the Property. The initial lease⁴ contained an option to renew and the right to lease additional space. In December 1987, Saatchi took additional space at the Property by entering into two new leases, one for ground level retail and basement space and one exclusively for basement space.⁵

As of February 17, 1988, Tishman and plaintiff entered into a brokerage agreement (Brokerage Agreement), which contains an acknowledgment by Tishman that plaintiff was the procuring cause of the Original Lease, the Retail Lease and the Basement Lease and that plaintiff was entitled to commissions for them. The Brokerage Agreement also entitled plaintiff to

² Saatchi has had corporate mergers and name changes during the relevant time period. For convenience, it will be referred to throughout this opinion as Saatchi.

³ The ground lease originally was between The Rector, Church-Wardens and Vestrymen of Trinity Church, as landlord, and Tishman Speyer Crown Equities, as tenant, who assigned the ground lease to Tishman.

⁴ The initial lease was dated as of June 4, 1985. It was amended on or about September 19, 1985. Subsequently, Saatchi and Tishman entered into a restated agreement of lease and a second restated agreement of lease, both dated as of June 4, 1985 (Original Lease).

⁵ Tishman and a Saatchi affiliate, Hudson Retail Joint Venture entered into a lease dated as of December 31, 1987 for retail space, ground and basement floors (Retail Lease). Tishman and Saatchi also entered into a basement lease in or about December 1987 (Basement Lease).

commissions for Saatchi's continued tenancy at the Property and any additional space it leased there. Plaintiff has not been paid for commissions owed as a result of Saatchi's renewal of its tenancy in April 2008 on terms and conditions generally consonant with the terms and conditions of the Original Lease.

At oral argument of the motion, the causes of action for *quantum meruit* (3rd), unjust enrichment (4th) and punitive damages (5th) were dismissed in accordance with a decision dictated on the record on January 21, 2010. The complaint contains the following remaining causes of action: breach of contract (1st); alternatively, if it is found that the lease renewal does not have terms generally consonant with the Original Lease, then Tishman should be estopped from denying plaintiff a commission because Tishman intentionally, in breach of the covenant of good faith and fair dealing, structured the transaction so as to deprive plaintiff of a commission (2nd); and declaratory judgment declaring plaintiff's entitlement to commissions (6th).

Documentary Evidence

The Original Lease stated on the cover page that it leased the 5th through 18th floors of the Property. However, it also gave Saatchi the right to lease additional spaces. The Original Lease defined its "Termination Date" as January 31, 2013. Under Article 42 of the Original Lease, Saatchi was entitled to two, ten-year renewal terms on the same terms and conditions, other than the amount of rent, if it or any related entity occupied 80% of the Property. Thus, Saatchi had a right to renew up to January 31, 2033. The rent for each renewal period was to be 90% of the fair market rent (FMR) for the first five years and 100% of the FMR for the second five years.

The Brokerage Agreement , ¶4(b), provides that if Saatchi leased additional space pursuant to Articles 39, 40 or 41 of the Original Lease, or renewed the term “pursuant to or generally consonant with Article 42” of the Original Lease, then plaintiff would be entitled to the commissions set forth in Schedule A. As of April 2, 2008, TST and Saatchi entered into a third amendment to lease (Amended Lease). The parties dispute whether the Amended Lease was a renewal “generally consonant” with Article 42 of the Original Lease. Defendants assert that the complaint must be dismissed based on the documentary evidence which establishes unambiguously that the Amended Lease is not generally consonant with Article 42, but rather a new lease.

The Amended Lease states that all of its capitalized terms have the same meaning as they do in the Original Lease. Article 2 of the Amended Lease says that effective as of February 1, 2008 (Effective Date), Saatchi would lease the “Premises,” which was defined as including the 5th through 18th floors and penthouse (Office Premises), as well as a portion of the basement (Basement Premises) of the Property “upon all of the terms and conditions of the Original Lease, except for the rent for the Office and Basement Premises beginning with the Effective Date through the Termination Date of the Original Lease (i.e., February 1, 2008 through January 31, 2013) and a rent abatement for surrendering certain premises (i.e., the Basement Premises by the Termination Date and the fifth or sixth floor by no later than March 31, 2013). The Amended Lease expressly reaffirms the escalator clauses in Article 27 of the Original Lease.

Article 3 of the Amended Lease creates an extension of the Original Lease that coincides with the first renewal period under the Original Lease. It provides that the Office Premises is

subject to an “Extension Period,” of February 1, 2013 through January 31, 2023, the latter defined as the “Extended Expiration Date.” Article 3 further provides that all references in the Original Lease to “Expiration Date” and “Term, term of this Lease or words of similar import,” are deemed to refer, respectively, to the Extended Expiration Date and Extension Period. During the Extension Period, Saatchi agrees to rent the Offices Premises upon the same terms and conditions of the Original Lease at a fixed annual rental of approximately \$33,000,000.00 for the first five years and \$38,000,000.00 for the second five years. However, as previously noted, under the Original Lease, the rent for the first renewal period was 90% of the FMR for the first five years and 100% of the FMR for the second five years, instead of the fixed annual rentals set forth in the Amended Lease.

The Amended Lease further provides for two additional ten-year renewal periods, exercisable if Saatchi or a related entity occupies 65% of the Office Premises.⁶ The first renewal period under the Amended Lease coincides with the second renewal period under the Original Lease, i.e., February 1, 2023 through January 31, 2033. During the this period, the Amended Lease provides for an annual rental based upon the fair market value (FMV) of the space.

Defendant makes the following arguments in support of its motion to dismiss. The Amended Lease is substantially different from the Original Lease because it changes the amount of rent payable upon renewal to a fixed dollar amount per square foot instead of a percentage of FMR; gives Saatchi the right to relinquish the fifth or sixth floor; gives Saatchi an eleven million

⁶ If Saatchi or a related entity occupies less than 65%, but at least 250,000 rentable square feet of the Office Premises, Saatchi can designate a portion of the Office Premises for renewal in certain circumstances.

dollar construction allowance; pre-approves certain subtenants; gives Saatchi the right to change the terms of subleases; expands Saatchi's right to lease more space; substitutes a new guarantor of Saatchi's lease obligations; and extends the term to 2023, with an option for two ten-year renewals to 2043 if Saatchi occupies 65% of the Property, as opposed to 80% under the Original Lease. Defendants also contend that Article 4(a) of the Brokerage Agreement provided that plaintiff would not receive a commission upon a renewal or extension of the Original Lease.

Discussion

While it is true that the rent payable for the Extension Period and first ten-year renewal term of the Amended Lease is somewhat different than the two ten-year renewal terms in the Original Lease, the court is unable to rule that as a matter of law they are not "generally consonant." Defendants have provided the court with no precedent applying New York law to this term, and the court's independent research has found no case which has construed the term generally consonant in the context of a lease renewal.⁷ If there is ambiguity in the contractual terminology, then the intent of the parties must be determined by the trier of fact based upon the credibility of extrinsic evidence, or on a choice among reasonable inferences to be drawn from extrinsic evidence. *Hartford Accident & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 (1973).

Here, the court cannot rule as a matter of law that the Amended Lease did not contain two ten-year renewal periods under generally consonant terms. While the Extension Period rent in the Amended Lease is fixed, rather than based upon FMR, plaintiff contends that it may have

⁷ The parties do not allege that the term is a term of art customarily used in the real estate industry.

been intended to approximate the FMR. The second renewal under the Original Lease and the first renewal under the Amended Lease base the rent on FNR and FMV, respectively, which may be generally consonant. Nor does the existence of new agreements in the Amended Lease that are unrelated to rent from 2013 to 2033 prove that, as a matter of law, the renewal terms were not generally consonant.

Further, the court agrees with plaintiff that it is entitled to discovery on whether the terms and conditions of the Amended Lease were tailored to avoid paying plaintiff's commission. Plaintiff is entitled to probe whether TSR and/or Tishman negotiated the Amended Lease terms to sabotage plaintiff's commission by substituting a fixed rental from 2013 to 2023 as an approximation of the anticipated FMR under the Original Lease first renewal and substituting FMV for FMR for the second renewal. *Skillgames, LLC v Brody*, 1 AD3d 247, 252 (1st Dept 2003)(covenant of good faith and fair dealing breached when party acts in manner not expressly forbidden by contract which would deprive other party of right to receive contract's benefits); *Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 (2d Dept 1999) (breach of covenant of good faith and fair dealing breached when facts tend to show defendant sought to prevent performance of contract or withhold its benefits from plaintiff). Defendants' argument that the Brokerage Agreement, Article 4(a), provides that plaintiff would receive no commission for a renewal lease, fails to take into account the exception contained in Article 4(b), which, as previously noted, provides a fee for a lease renewal on terms generally consonant with the Article 42. Accordingly, it is

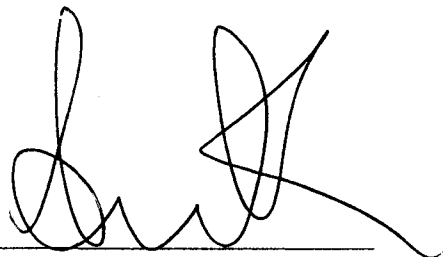
ORDERED that defendants' motions for a protective order and to quash subpoenas are

permitted to be withdrawn as moot, as plaintiffs withdrew their discovery requests and subpoenas with leave to renew upon determination of this motion, and the parties are directed to prepare to discuss those issues at the compliance conference scheduled for April 6, 2010 at 9:30 am; and it is further

ORDERED that the third, fourth and fifth causes of action are dismissed in accordance with the decision dictated on the record on January 21, 2010 and the remainder of the complaint shall be severed and shall continue.

Dated: March 18, 2010

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J.S.C.