

Lansco Corp. v Strike Holdings LLC

2011 NY Slip Op 30234(U)

January 20, 2011

Supreme Court, New York County

Docket Number: 601089/10

Judge: Doris Ling-Cohan

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

PRESENT: *Hon. Doris Ling-Cohan*

PART 36

Index Number : 601089/2010

LANSCO CORPORATION

vs
STRIKE HOLDINGS LLC

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/^{cross-motion}for dismiss and

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

5
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *by plaintiff* to *dismiss counterclaims & cross-motion* to *amend* are decided in accordance with the attached memorandum decision.

FILED

JAN 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/20/11



JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 36

THE LANSCO CORPORATION,
Plaintiff,

-against-

STRIKE HOLDINGS LLC and GFI REALTY
SERVICES, INC.,

Defendants.

INDEX NUMBER 601089/10
Motion Sequence 001 & 002
DECISION & ORDER

FILED

JAN 27 2011

DORIS LING-COHAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Lansco Corporation (Plaintiff) moves for leave to further amend its amended complaint. Defendant GFI Realty Services, Inc. (GFI), opposes and cross-moves to dismiss the amended complaint as against it for failure to state a cause of action (Mot. Seq. 001) (the First Motion). Defendant Strike Holdings LLC (Strike) opposes and cross-moves to dismiss the amended complaint as against it for failure to state a cause of action, adopting GFI's arguments. Additionally, Plaintiff moves to dismiss Strike's first and second counterclaims in its answer (Mot. Seq. 002) (the Second Motion). Strike opposes and cross-moves for leave to file an amended answer and counterclaims.

Factual Background

Robert K. Futterman & Associates LLC (RKF) had secured an agreement with the owner of a building located at 229 West 43rd Street, New York County (the Building), effective September 7, 2007, to be the exclusive broker for the Building's rental space. Ex. C, attached to Rubackin Opposition Aff. Plaintiff, a real estate broker, allegedly cooperated with RKF to find tenants for the Building. GFI subsequently participated in a lease transaction in the Building.

On or about June 18, 2008, Strike sent a letter addressed to the Building's owner, with

copies to RKF and Plaintiff, expressing Strike's interest in leasing space in the Building for a bowling alley occupying the cellar and ground floor for a 15-year term at \$3.25 million yearly (the First Proposal). Ex. 6, attached to the First Motion. The letter outlined the anticipated terms and conditions of a commercial lease between the owner and Strike, landlord and tenant. It identified Plaintiff and RKF as the only real estate brokers involved with the deal and held the landlord "responsible for any and all payments due The Lansco Corporation and Robert K. Futterman." *Id.*

On July 8, 2008, Plaintiff forwarded to the owner a revised lease proposal from Strike (the Second Proposal). Ex. 7, attached to the First Motion. The most significant difference was a change of the leased space to a small space on the ground floor (with sidewalk frontage), part of the second floor and the entire third floor of the Building for a 15-year term at \$2.95 million yearly. The provision for the brokers was changed to the "Landlord shall be responsible for any and all payments due Robert K. Futterman, and shall pay The Lansco Corporation one half of one full commission per their attached rate schedule." *Id.* On July 16, 2008, RKF sent a counterproposal in the owner's behalf to Strike in care of Plaintiff, increasing the base rent from \$2.95 million yearly to \$5.035 million for 15 years. Ex.10, attached to the First Motion. The provision for the brokers was changed to "Robert K. Futterman and Associates, LLC and The Lansco Corporation to split one (1) full commission."

On July 22, 2008, Strike submitted the draft of another lease proposal to the Building's owner for a 20-year term (the previous proposals had been for 15 years) at \$3.863 million yearly for the entire third and fourth floors plus the small ground floor space (the Third Proposal). Ex. 8, attached to the First Motion. The provision for the brokers returned to the language of the First Proposal, without mention of apportioning the commission as in the Second Proposal or the

[* 4]

counterproposal. There was no written response to the Third Proposal and Strike submitted another on August 4, 2008 (the Fourth Proposal). Ex. 9, attached to the First Motion. The lease term proposed was 20 years at \$4.012 million yearly for the entire second floor, a portion of the third floor and the small space on the ground floor. The language concerning the brokers repeated the language of the Second Proposal, specifying that Plaintiff receive one half of one full commission.

As of December 30, 2009, a lease was executed between the Building's owner and Bowlmor Times Square, LLC, for 20 years, at an annual minimum rent of \$4.5 million (rising over time), for the entire third floor and part of the fourth floor. Ex. D, attached to Rubackin Opposition Aff. All of the proposals exchanged among Plaintiff, Strike, RKF and the Building's owner, including the counterproposal submitted by RKF, named Bowlmor Times Square, LLC, as the tenant. The lease identified the cooperating brokers as RKF and GFI Retail Group, who were to be paid their commission by the Building's owner. Lease § 1.01 (N). Plaintiff is not named as a broker and has not been offered any commission on the deal.

Plaintiff's Motion for Leave to Amend (Mot. Seq. 001)

Plaintiff commenced the instant action on or about April 28, 2010. The original complaint was amended as of right and asserts causes of action for: (1) breach of contract against Strike; (2) tortious interference with a business relationship against Strike; (3) tortious interference with a business relationship against Strike and GFI, acting together; (4) breach of contract against Strike and GFI; and (5) a right to future commissions against Strike and GFI. The amended complaint asks for damages of at least \$1 million on each of the first four causes of action. The proposed second amended complaint, attached as Exhibit 1 to the First Motion, essentially repeats the first three causes of action, adding alleged factual detail, but repleads the

fourth and fifth causes of action as follows: (4) tortious interference with Plaintiff's business relationship with RKF and Strike against GFI; (5) tortious interference with Plaintiff's business relationship with the Building's owner against GFI; (6) violation of New York's Real Property Law (RPL) §§ 440-a and 442-e by GFI; and (7) a right to future commissions against Strike and GFI. The damages requested for the first five causes of action are \$1.2 million, with punitive damages of \$1 million for the third and fourth causes of action. Damages requested for the sixth cause of action are up to four times GFI's commission, pursuant to RPL § 442-e (3).

CPLR 3025 (b) provides for the court to freely give leave to amend "upon such terms as may be just." *See Kocak v Egert*, 280 AD2d 335 (1st Dept 2001) ("Where, as here, the proposed amended pleading stated meritorious causes of action supported by affidavits and evidentiary showings, and there was no apparent prejudice to the opposing party, leave to amend is to be 'freely given'"); *Valdes v Marbrose Realty*, 289 AD2d 28, 29 (1st Dept 2001) ("Leave to amend is freely given absent prejudice or surprise...[p]rejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment").

Plaintiff's instant motion for leave to amend was filed just over two months after the action commenced and less than two months after plaintiff amended as of right. This time interval does not evoke any prejudice to defendants. Discovery has barely begun, a preliminary discovery conference has not been held and no depositions have yet been conducted. Moreover, six of the seven causes of action in the proposed second amended complaint approximate the five causes of action in the amended complaint; adding an allegation of statutory violations, particularly referencing the RPL in a real estate transaction, cannot be considered prejudicial.

The cause of action alleging a violation of the RPL is based on claims that Lon Rubackin, purportedly a principal at GFI, was not licensed as a real estate broker or salesperson in New York when he negotiated the lease between Strike and the Building's owner.¹ This claim is supported by a certified statement from Kathleen M. McCoy, Special Deputy Secretary of State, that Rubackin was issued a real estate salesperson's license for the period March 3, 2009 through March 2, 2011. Ex. 5 attached to First Motion. Plaintiff also submits Rubackin's real estate salesperson's application, signed on February 9, 2009, and marked effective March 3, 2009. *Id.* While the lease at issue was executed on or by December 30, 2009, Plaintiff and Strike agree that GFI entered the picture in late 2008. Under these circumstances, a possible violation of RPL § 440-a constitutes a meritorious claim and it is proper to amend the complaint to include it. Rubackin attempts, in opposition, to qualify his participation and to limit the role of Plaintiff in the lease transaction. The filing and serving of the second amended complaint and defendants' answer in response thereto, will offer the parties the opportunity to assert their claims and defenses as to disputed real estate transaction.

Defendants' cross motions to dismiss the amended complaint are denied. On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Here, the facts, although disputed, sufficiently support the asserted causes of action.

¹RPL § 440-a: "No person . . . shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or otherwise as a real estate broker or real estate salesman in this state without first procuring a license therefor as provided in this article."

Plaintiff's Motion to Dismiss Counterclaims (Mot. Seq. 002)

Plaintiff moves to dismiss Strike's counterclaims pursuant to CPLR 3211(a)(1) (documentary evidence) and CPLR 3211(a)(7) (failure to state a cause of action). In its amended answer, dated July 7, 2010, attached as Exhibit 12 to the Second Motion, Strike asserts two counterclaims against Plaintiff. In its cross motion to the Second Motion (the Second Cross Motion), Strike asks leave to amend its amended answer, including the counterclaims. The first counterclaim in the proposed second amended answer alleges that Plaintiff failed to properly perform services, that is, among other things, it "failed to keep Defendant [Strike] apprised of the status of proposals, failed to convey offers, alienated AI [the Landlord] by scheduling meetings without notifying all parties or confirming who would attend, and did not or could not provide any meaningful advice or analysis." Ex. H attached to Second Cross Motion, ¶ 26. The second counterclaim in the proposed second amended answer alleges negligence, in that "Plaintiff was negligent by failing to timely, properly and competently perform its duties as agreed by the parties." *Id.*, ¶ 40. It is worded identically in the amended answer and second amended answer. The first counterclaim asserts a reasonable cause of action. The second counterclaim, on the other hand, offers only a generalization of what the first counterclaims specifies; it serves no purpose thereby. Therefore, Strike's cross motion for leave to amend its answer is denied in regard to its second counterclaim, but otherwise granted. Plaintiff's motion to dismiss Strike's first counterclaim is denied and its motion to dismiss Strike's second counterclaim is granted. The documentary evidence relied upon by plaintiff does not warrant dismissal of Strike's first counterclaim, at this juncture.

WHEREFORE, it is

ORDERED that Plaintiff's motion for leave to amend the amended complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of this order with notice of entry thereof (Mot. Seq. 001); and it is further

ORDERED that the defendants shall serve an answer to the second amended complaint or otherwise respond within 20 days of said service; and it is further

ORDERED that GFI's cross motion to dismiss the amended complaint as against it for failure to state a cause of action is denied; and it is further

ORDERED that Strike's cross motion to dismiss the amended complaint as against it for failure to state a cause of action is denied; and it is further

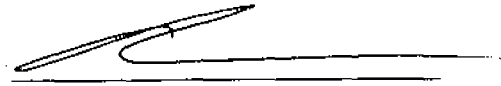
ORDERED that Strike's cross motion for leave to amend its amended answer herein is denied in regard to its second counterclaim, but otherwise granted, and it is further

ORDERED that Plaintiff's motion to dismiss Strike's first counterclaim is denied; and it is further

ORDERED that Plaintiff's motion to dismiss Strike's second counterclaim is granted.

DATED: January 20, 2010

FILED
JAN 27 2011
NEW YORK
COUNTY CLERK'S OFFICE



Doris Ling-Cohan, J.S.C.