

Newmark & Co. Real Estate, Inc. v 1523 Ave. M, LLC
2011 NY Slip Op 30555(U)
February 16, 2011
Supreme Court, New York County
Docket Number: 601175/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Newmark

INDEX NO.

601175/10

MOTION DATE

- v -

MOTION SEQ. NO.

001

1523 Avenue M, LLC

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

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.*

RECEIVED
FEB 18 2011
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NYS SUPREME COURT - CIVIL

FILED

FEB 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: [Signature] FEB 16 2011

[Signature]
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: IAS PART 10**

-----X
NEWMARK & COMPANY REAL ESTATE, INC.,
d/b/a NEWMARK KNIGHT FRANK,

Plaintiff,

-against-

1523 AVENUE M, LLC,

Defendant.

DECISION/ ORDER
Index No.: 601175/10
Seq. No.: 001, 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

-----X
1523 AVENUE M, LLC,

Third-Party Plaintiff,

-against-

SELFHELP COMMUNITY SERVICES, INC.,
MICHAEL MOORIN and PAUL DAVIDSON,

Third-Party Defendants

Third Party
Index No.: 590541/10

FILED
FEB 23 2011
NEW YORK
COUNTY CLERK'S OFFICE

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

PAPERS	NUMBERED
Seq #001	
Pltf's n/m [3212] w/MM affid, exhs	1
Def 1523's x/m [3212] w/AP affid, exhs	2
Pltf's opp w/MM affid, exhs	3
Def 1523's reply w/AP affid, exh	4
 Seq #002	
3PDef Selfhelp's n/m [3211] w/TP affid, exhs	5
Def 1523's opp w/AMF affirm, AP affid, exhs	6
3PDef Selfhelp's reply w/LAB affirm	7

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, Newmark & Company Real Estate, Inc. d/b/a Newmark Knight Frank ("Newmark"), to recover a broker's commission from defendant, 1523 Avenue M, LLC ("1523 Ave"), for a lease entered into between 1523 Ave and third-party defendant, Selfhelp Community Services, Inc. ("Selfhelp"). Newmark now moves pursuant to CPLR § 3212 for summary judgment against 1523 Ave, and 1523 Ave cross-moves for summary judgment dismissing the complaint (Seq. No. 001). Selfhelp also moves, pre-answer, pursuant to CPLR § 3211 (a)(1), (7) to dismiss the third-party complaint against it (Seq. No. 002). Third-party defendants, Michael Moorin ("Moorin") and Paul Davidson ("Davidson"), have not appeared in this action.

Newmark's motion for summary judgment, 1523 Ave's cross-motion for summary judgment, and Selfhelp's motion to dismiss are considered collectively by this court in a single decision.

Facts and Arguments Presented

The following facts are undisputed: 1523 Ave is the owner of a building located at 1523 Avenue M, Brooklyn, New York (the "Building"). In June of 2009, 1523 Ave offered space for lease at the Building. In July of 2009, Newmark and Selfhelp inspected the Building, and on September 16, 2009, Selfhelp authorized Newmark, its broker, to submit a proposal to 1523 Ave for Selfhelp to lease the second floor of the Building. In October of 2009, 1523 Ave, as landlord, and Selfhelp, as tenant, entered into a lease agreement for the second floor of the Building (the "Lease").

Article 50 of the Lease provides, as follows:

Broker

50. The Tenant warrants and represents to the Owner that it has consulted no broker in connection with this transaction other than Newmark Knight Frank ("Newmark"), and that no broker, other than Newmark, was instrumental in consummating this Lease, or in negotiating or discussing the terms of this Lease. Tenant agrees to hold the Owner harmless for any claims made by any broker other than Newmark who claims to have dealt with the Tenant in connection with this transaction including without limitation, the cost of reasonable counsel fees and expenses. Landlord shall pay the commission associated with this lease and any option exercised hereunder to Newmark pursuant to a separate agreement between the Owner and Newmark.

Newmark is not a signatory or party to the Lease agreement, but nevertheless seeks to enforce 1523 Ave's obligation to pay its broker's commission.

In a letter dated March 30, 2010, the Vice President of Selfhelp sent Abe Podolsky ("Podolsky"), member of 1523 Ave, a letter stating, in relevant part:

It has come to my attention that you believe there was another broker involved. Please be advised that no other broker represented Selfhelp in the 1523 Avenue M transaction. NKF has worked diligently on our behalf and I feel they should be compensated per the terms of the deal they arranged between you and Selfhelp.

Newmark alleges in its complaint that, as of October 31, 2009, 1523 Ave owes Newmark \$87,608.78 for its broker's commission pursuant to the Lease.

1523 Ave seeks a declaration that Newmark is not entitled to a commission in connection with the Lease. 1523 Ave asserts five counterclaims ("CC__") against Newmark for: coercion and conspiring to extort money from 1523 Ave (CC1); violation

of Real Property Law § 442 (CC2); breach of fiduciary duty and loyalty (CC3); damaged reputation and character (CC4); and loss of business and revenue (CC5).

Newmark now moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint. Newmark also moves to dismiss 1523 Ave's first, second, and third counterclaims for failure to state a claim and based on documentary evidence, and to dismiss the fourth and fifth counterclaims for failure to state a claim. CPLR § 3211(a)(1),(7). Newmark also moves to dismiss 1523 Ave's ten affirmative defenses. CPLR § 3211(b).

1523 Ave contends that the Building was advertised through its licensed broker, American Properties Registry Inc. ("APR"), who placed signs in the Building in April of 2009. 1523 Ave contends that Selfhelp contacted APR and inquired about leasing office space and then visited the Building on two separate occasions. 1523 Ave asserts that after Selfhelp advised APR that it wanted to enter into a lease, it was notified that Newmark was the exclusive broker for Selfhelp, and that Selfhelp's lease would need to be negotiated through Newmark. 1523 Ave states that it never agreed upon the amount or manner in which the broker's commission would be paid, but that 1523 Ave and Selfhelp, nevertheless, entered into a Lease.

1523 Ave argues in its cross-motion for summary judgment that, *inter alia*, Newmark is not entitled to recover a broker's commission because it was not the procuring cause of the Lease. 1523 Ave also argues that it never entered into a separate broker's commission agreement with Newmark, as specified under Article 50 of the Lease, and, therefore, Newmark is not entitled to recover a commission.

In the third-party action, 1523 Ave asserts four causes of action. 1523 Ave

seeks a declaratory judgment that Selfhelp is obligated to indemnify and hold 1523 Ave harmless from APR, pursuant to Article 50 of the Lease (COA1) and for attorney's fees (COA2). 1523 Ave also alleges that Moorin and Davidson breached their fiduciary duties owed to 1523 Ave (COA3 and COA4).

Selfhelp moves to dismiss the third-party complaint against it based on failure to state a claim and based upon the documentary evidence. CPLR § 3211 (a)(1),(7). Selfhelp argues that the complaint should be dismissed because there is no litigation pending between APR and 1523 Ave and that the two entities are, in fact, operated by the same principal, Podolsky, at the same address.

Discussion

Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233

A.D.2d 161, 162 (1st Dept. 1996). 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 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

Plaintiff's Motion and 1523 Ave's Cross-Motion for Summary Judgment

Where a contract of sale admits the broker's performance of services, the broker is entitled to summary judgment on its claim for a commission. Helmsley-Spear, Inc. v. New York Blood Center, Inc., 257 A.D.2d 64 (1st Dept. 1999); Holiday Management Associates, Inc. v. Albanese, 173 A.D.2d 775 (2d Dept. 1991). Where a lease provides for the payment of a commission directly by the seller/owner to the broker, this constitutes an admission by the seller/owner that the broker rendered some services with respect to the transaction and is entitled to the reasonable value thereof. See William B. May Co., Inc. v. Monaco Associates, 80 A.D.2d 798 (1st Dept. 1981); Ficor, Inc. v. National Kinney Corp., 67 A.D.2d 659 (1st Dept. 1979).

Plaintiff has established that 1523 Ave and Selfhelp entered into a Lease agreement in which 1523 Ave agreed to "pay the commission associated with this lease and any option exercised hereunder to Newmark pursuant to a separate agreement between the Owner and Newmark." No separate agreement was, however, achieved. This does not void or extinguish the provision of the Lease pertaining to the broker's

commission. Podolsky admits in his affidavit that he attempted to negotiate a commission with Newmark, but after many conversations, the parties never agreed upon the *amount* or *manner* in which the commission would be paid – not whether 1523 Ave would pay Newmark a commission. The court finds that regardless of whether there was a separate agreement setting forth the terms and amount of the commission, the Lease is unambiguous. Where the intent of the parties can be determined from the face of the agreement, interpretation of the contract will be a matter of law and the case ripe for summary judgment. American Express Bank v. Uniroyal, 164 A.D.2d 275 *app den.* 77 NY2d 807 (1991). The court must give weight to what is in the contract, not in the parties' minds. W.W.W. Associates Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

Furthermore, even though Newmark is not a party to the contract, it is asserting its rights as a third-party beneficiary. A party asserting rights as a third-party beneficiary must establish “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.” State of California Public Employees' Retirement System v. Sherman & Sterling, 95 N.Y.2d 427, 435 (2000).

As per the plain language in the Lease, 1523 Ave is obligated to pay Newmark a broker's commission. These benefits are for the direct benefit of Newmark. Thus, the overall purpose of Article 50 of the Lease is to establish an obligation owed to Newmark under the Lease. Newmark has, therefore, pled the elements necessary to establish a breach of contract action as a third-party beneficiary of the contract allegedly breached.

State of California Public Employees' Retirement System v. Sherman & Sterling, supra.; Braten v. Banker's Trust, 60 N.Y.2d 155, 163-64 (1983); Internationale Nederlanden Capital Corp. v. Banker's Trust Co., 261 A.D.2d 117 (1st Dept. 1999); Qursler v. Women's Interart, 170 A.D.2d 407 (1st Dept. 1991). As the third-party beneficiary, Newmark has the right to directly enforce 1523 Ave's payment of a broker's commission under the Lease.

Accordingly, the court finds that Newmark has set forth a *prima facie* case that it is owed a commission from 1523 Ave.

i. Extortion/Coercion

1523 Ave alleges in its first counterclaim (CC1) that it is entitled to a declaratory judgment that it does not have to pay Newmark a commission based upon tort claims that sound in extortion/coercion. 1523 Ave alleges, *inter alia*, that Newmark attempted to coerce 1523 Ave by posing as Selfhelp's exclusive broker at the last minute; forced 1523 Ave to sign with Newmark; and threatened 1523 Ave that it would not enter into a lease with Selfhelp unless Newmark was involved with the deal.

Extortion is a criminal offense (see Penal Law § 155.05[2][e]; § 110.00) that does not imply a private right of action. Minnelli v. Soumayah, 41 A.D.3d 388 (1st Dept. 2007). Additionally, 1523 Ave provides no facts or evidence that would support a claim for coercion. The fact that 1523 Ave made a business decision to enter into a Lease with Selfhelp, specifying that Newmark was the exclusive broker, is not coercion. 1523 Ave was not forced to enter into the Lease and could have found another tenant to occupy the space if it did not want to pay Newmark a commission. The court hereby dismisses 1523 Ave's 1st counterclaim.

ii. Real Property Law § 442

1523 Ave alleges in its second counterclaim (CC2) that it is entitled to a declaratory judgment because Newmark violated Real Property Law § 442 by agreeing to split its commission with Selfhelp, a non-licensed entity, to receive “kick-back.” Newmark contends that it offered to give up a portion of its commission if 1523 Ave would give Selfhelp improvements or free rent.

Real Property Law § 442 provides, as follows:

442-d. Actions for commissions; license prerequisite

No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

The court finds that Newmark, by offering to reduce its commission, did not violate RPL § 442. It is industry standard for a broker to offer to reduce its commission in order to finalize a sale, and commissions are negotiable. See, e.g. Zere Real Estate Servs., Inc. v. Adamag Realty Corp., 60 A.D.3d 758 (2d Dept. 2009); Sperte v. Shaffer, 111 A.D.2d 856 (2d Dept. 1985).

The court hereby dismisses 1523 Ave’s 2nd counterclaim.

iii. Breach of Fiduciary Duty

To establish a breach of fiduciary duty, the pleader must show the existence of a fiduciary relationship, misconduct that induced the pleader to engage in the transaction in question, and damages directly caused by that misconduct. Barrett v. Freifeld, 64

[* 11]
A.D.3d 736, 739 (2d Dept. 2009).

The primary reason why breach of fiduciary duty will not lie is because 1523 Ave and Newmark did not have a fiduciary relationship. The undisputed facts are that Newmark was acting as an agent for and negotiating with 1523 Ave on behalf of Selfhelp. While Newmark may have had fiduciary obligations to Selfhelp, there were no duties owed to 1523 Ave. Rivkin v. Century 21 Teran Realty LLC, 10 N.Y.3d 344 (2008). Accordingly, 1523 Ave's 3rd counterclaim for breach of a fiduciary duty is dismissed.

iv. Damaged Reputation and Loss of Business

Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander). Morrison v. National Broadcasting Co., 19 N.Y.2d 453 (1967). The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which are published to a third-party; and (4) which result in injury to plaintiff. Idema v. Wager, 120 F.Supp.2d 361 (SDNY 2000); Ives v. Guilford Mills, 3 F.Supp.2d 191 (NDNY 1998). Certain statements are considered libelous *per se*. They are limited to four categories of statements that: (1) charge plaintiff with a serious crime; (2) tend to injure plaintiff in its business, trade or profession; (3) the plaintiff has some loathsome disease; or (4) impute unchastity. Liberman v. Gelstein, 80 N.Y.2d 429 (1992); Harris v. Hirsh, 228 A.D.2d 206 (1st Dept. 1996). Where statements are libelous *per se*, the law presumes that damages will result and they need not be separately proved.

Here, 1523 Ave alleges that Newmark has damaged its reputation and character by disseminating information to third parties and by filing a Complaint with the court

(CC4), resulting in 1523 Ave losing a significant amount of business and revenue (CC5). 1523 Ave's 4th counterclaim for defamation must be dismissed because 1523 Ave does not allege the particular spoken or published words on which the claim is based. CPLR § 3016(a); Moreira-Brown v. City of New York, 71 A.D.3d 530 (1st Dept. 2010). The court also dismisses 1523 Ave's 5th counterclaim for loss of business. 1523 Ave has failed to support or particularize its allegation for loss of business with any facts.

Newmark has shown a *prima facie* entitlement to summary judgment and 1523 Ave has failed to show the existence of a factual issue requiring trial. Zuckerman, *supra* at 562. 1523 Ave also asserts ten affirmative defenses, including improper venue, laches, statute of frauds, and unclean hands. None of these, either individually or collectively, defeat Newmark's motion for summary judgment. Accordingly, Newmark's motion for summary judgment is granted and 1523 Ave's cross-motion for summary judgment is denied.

Selfhelp's Motion to Dismiss

In deciding whether any claims must be dismissed, the court is not required to decide whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1st Dept. 1977).

Where a motion to dismiss is premised upon CPLR § 3211(a)(7), the legal sufficiency of the factual allegations are tested. The court, under those circumstances, is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant. Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998); Sanders v. Winship, 57 N.Y.2d 391 (1982). If, from its four corners, factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, the motion for dismissal will fail. The court's inquiry is whether the plaintiff *has* a cause of action, not whether it has stated one. Guggenheimer v. Ginzberg, *supra*.

Furthermore, since this motion is also based upon documentary evidence (CPLR § 3211(a)(1); *see also* Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 [1st Dept. 2006]), the evidence provided must definitively dispose of plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 [1st Dept. 1995]).

Consequently, unless disproved through, for example, documentary evidence [CPLR § 3211 (a)(1)], or the complaint fails to set forth a cognizable cause of action [CPLR § 3211 (a)(7)], the complaint should be preserved until issue has been joined and the claims are ready for a dispositive motion or trial.

i. Indemnification and Attorney's Fees

1523 Ave alleges that Selfhelp breached its contractual obligation to indemnify and hold harmless, as provided under Article 50 of the Lease. The Lease provides, "Tenant agrees to hold the Owner harmless for any claims made by any broker other than Newmark who claims to have dealt with the Tenant in connection with this

transaction including without limitation, the cost of reasonable counsel fees and expenses.” 1523 Ave contends that APR initiated a lawsuit against it for a brokerage commission and that Newmark has an obligation to indemnify and hold 1523 Ave harmless.

Selfhelp contends that there is no action pending against 1523 Ave by APR and that 1523 Ave and APR are, in fact, owned by the same person and are operating out of the same address. Selfhelp provides a print-out of the New York State Secretary of State website listing Podolsky as the “Chairman or Chief Executive Officer” of APR with an address at 4815 Avenue N, Brooklyn, New York, 11234. Podolsky is also a member of 1523 Ave, with the same listed address.

The court finds that 1523 Ave’s claims against Selfhelp are asserted prematurely because Selfhelp has not provided the court with any facts tending to show that APR has taken any legal action against the owner. When and if ever such claims are asserted, it appears that Selfhelp has serious defenses. Selfhelp’s motion to dismiss the third-party complaint against it is, therefore, granted. Accordingly, the third-party complaint, as against Selfhelp only, is severed and dismissed.

Neither of the individually named third-party defendants have answered the third-party complaint or appeared and there is no motion before the court for any relief as to them. Accordingly, the claims against Moorin and Davidson shall continue.

ii. Sanctions

Selfhelp moves for sanctions against 1523 Ave. Pursuant to 22 NYCRR §130-1, sanctions can be imposed when conduct complained of is frivolous.

Conduct is frivolous within the meaning of Part 130 if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

The Court must set forth the basis for the imposition of sanctions and the amount of sanctions imposed. (Yemon Corp. v 155 Wooster Street, Inc., 33 A.D.3d 67 (1st Dept. 2006). Any remedy must be dictated by fairness and equity. Levy v. Carol Management Corp., 260 AD2d 27 (1st Dept. 1999). However, it is the burden of the party seeking sanctions to prove their entitlement to them.

Here, Selfhelp does not articulate the basis for why sanctions should be imposed. Having failed to prove their entitlement to them, Selfhelp's motion for sanctions must be, and hereby is, denied.

February 16, 2011

Based on the foregoing, the court concludes that:

Newmark's motion for summary judgment is granted and 1523 Ave's cross-motion for summary judgment is denied. Selfhelp's motion to dismiss is granted and the third-party complaint against it is hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff, NEWMARK & COMPANY REAL ESTATE, INC., d/b/a NEWMARK KNIGHT FRANK, motion for summary judgment against defendant, 1523 AVENUE M, LLC, is GRANTED; and it is further

ORDERED that defendant, 1523 AVENUE M, LLC's cross-motion for summary judgment against, plaintiff, NEWMARK & COMPANY REAL ESTATE, INC., d/b/a NEWMARK KNIGHT FRANK, is DENIED; and it is further

ORDERED that third-party defendant, SELFHELP COMMUNITY SERVICES, INC.'s motion to dismiss against defendant/third-party plaintiff, 1523 AVENUE M, LLC, is GRANTED; and it is further

ORDERED that third-party defendant, SELFHELP COMMUNITY SERVICES, INC.'s motion for sanctions against defendant/third-party plaintiff, 1523 AVENUE M, LLC, is DENIED; and it is further

ORDERED that the third-party complaint is hereby severed and dismissed against SELFHELP COMMUNITY SERVICES, INC.; and it is further

ORDERED that the third-party complaint against MICHAEL MOORIN and PAUL DAVIDSON shall continue; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby expressly denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

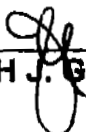
Dated: New York, New York
February 16, 2011

FILED

FEB 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.